

IN THE
Supreme Court of the United States

OCTOBER TERM, 1959

No. ~~914~~ 80

PAN-AMERICAN PETROLEUM CORPORATION,
a Delaware Corporation, *Petitioner*,

v.

THE SUPERIOR COURT OF THE STATE OF DELAWARE IN
AND FOR NEW CASTLE COUNTY; and THE HONORABLE
ANDREW D. CHRISTIE, sitting as a Judge of that
Court, and CITIZEN SERVICE GAS COMPANY, a
Delaware Corporation, *Respondents*.

**PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF DELAWARE**

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INDEX

	Page
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statutes Involved	3
Statement	4
Reasons for Granting the Writ	11
1. The State Court Has Decided A Federal Question of Substance Not Heretofore Determined By This Court	13
2. The Decision Of The State Court Is Probably Not In Accord With Applicable Decisions Of This Court	15
3. The Court Below Misinterprets United Gas Pipe Line Co. v. Mobile Gas Service Corp., 350 U.S. 332 (1956)	18
4. For Any Court To Have Jurisdiction It Would Have Been Necessary For The Plaintiff To Have Exhausted Its Administrative Remedies Before The Federal Power Commission	20
5. This Action Is One Brought To Enforce A Right Created By The Natural Gas Act And Hence, Jurisdiction Of The State Court Is Excluded By Section 22 Of The Act	22
Conclusion	25

CITATIONS

CASES:

<i>Bel Oil Corp. v. F. P. C.</i> , 255 F. 2d 548 (5th Cir. 1958)	17
<i>Cities Service Gas Co. v. F. P. C.</i> , 255 F. 2d 860 (10th Cir. 1958)	19
<i>Cities Service Gas Co. v. State Corporation Commission of Kansas, et al.</i> , 355 U.S. 391 (1958)	4, 18, 24
<i>Cities Service Gas Producing Co. v. F. P. C.</i> , 233 F. 2d 726 (10th Cir. 1956)	17
<i>City of Tacoma v. Taxpayers of Tacoma</i> , 357 U.S. 320 (1958)	19, 21
<i>Continental Oil Co. v. F. P. C.</i> , 236 F. 2d 839 (5th Cir. 1956)	17
<i>Episcopal Theological Seminary of the Southwest, et al. v. F. P. C.</i> , 269 F. 2d 228 (D.C. Cir. 1959)	17
<i>F. P. C. v. Colorado Interstate Gas Co.</i> , 348 U.S. 492 (1955)	19

	Page
<i>F. P. C. v. Hope Natural Gas Co.</i> , 320 U.S. 591 (1944)	19
<i>F. P. C. v. Shell Oil Co.</i> , No. 170, October Term, 1959	11
<i>Myers, et al. v. Bethlehem Shipbuilding Corp.</i> , 303 U.S. 41 (1938)	21
<i>Mississippi Power & Light Co. v. Memphis Natural Gas Co.</i> , 162 F.2d 388 (5th Cir. 1947)	17
<i>Montana-Dakota Utilities Co. v. Northwestern Public Service Co.</i> , 341 U.S. 246 (1951)	11, 15, 16, 18, 19, 20
<i>Natural Gas Pipeline Co. of America v. F. P. C.</i> , 253 F.2d 3 (3rd Cir. 1958)	20
<i>Natural Gas Pipeline Co. of America v. Panama Corp., et al.</i> , 349 U.S. 44 (1955)	24
<i>Phillips Petroleum Co. v. State of Wisconsin, et al.</i> , 347 U.S. 672 (1954)	4
<i>Portsmouth Gas Co. v. F. P. C.</i> , 247 F.2d 90 (D.C. Cir. 1957)	19
<i>Prentiss, et al. v. Atlantic Coast Line Co.</i> , 211 U.S. 210 (1908)	21
<i>Signal Oil & Gas Co. v. F. P. C.</i> , 238 F.2d 771 (3rd Cir. 1956)	17
<i>Texas & Pacific Railway Co. v. Abilene Cotton Oil Co.</i> , 204 U.S. 426 (1907)	16
<i>Tyler Gas Service Co. v. F. P. C.</i> , 247 F.2d 590 (D.C. Cir. 1957)	19
<i>United Gas Pipe Line Co. v. Memphis L. G. & W. Division</i> , 358 U.S. 103 (1958)	21
<i>United Gas Pipe Line Co. v. Mobile Gas Service Corp.</i> , 350 U.S. 332 (1956)	18, 19, 20, 21
<i>Yakus v. United States</i> , 321 U.S. 414 (1944)	21

STATUTES:

Judicial Code, 28 U.S.C., Section 1257(3)	2
Natural Gas Act,	
Section 4, 15 U.S.C. 717c	3, 11, 12, 20
Section 5, 15 U.S.C. 717d	3, 11, 12, 20
Section 16, 15 U.S.C. 717o	3
Section 19, 15 U.S.C. 717r	3, 7, 19, 21
Section 22, 15 U.S.C. 717u	2, 3, 7, 22, 23, 24
Federal Power Act, 16 U.S.C. 824d & 824e	15
Federal Power Commission Regulations under the Natural Gas Act, 18 C.F.R. 154.92-154.94	3, 4
Federal Power Commission Orders Nos. 174, 174-A	4, 7

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**PETITION FOR WRIT OF CERTIORARI
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STATE OF DELAWARE**

Petitioner prays that a writ of certiorari issue to
review the judgment of the Supreme Court of the
State of Delaware in its Civil Action No. 69, 1959.

OPINIONS BELOW

The opinion of the Superior Court of Delaware in
and for New Castle County in Civil Action Nos. 670,

671 and 708 (1958) is reported at 155 Atl. 2d 879 (Appendix A, pp. 1a-15a). The opinion of the Supreme Court of Delaware is reported at 158 Atl. 2d 478 (Appendix B, pp. 16a-30a).

JURISDICTION

The judgment of the Supreme Court of Delaware was made and entered on March 18, 1960 (Appendix C, pp. 31a-33a). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257(3). The issue of Petitioner's rights and immunities under the Natural Gas Act was raised in its Answer (R. 24), and in its Motion for Summary Judgment (Appendix D, pp. 34a-35a) in the Superior Court, and again by Petition for Writ of Prohibition in the Supreme Court of Delaware (Appendix E, pp. 37a-44a).

QUESTION PRESENTED

Respondent Cities Service Gas Company sued Petitioner in a state court to recover alleged overpayments for natural gas purchased at rates subject to the jurisdiction of the Federal Power Commission. The action was based upon a "contract" price and an alleged agreement not on file with the Commission. Petitioner moved for summary judgment contending that the action was a collateral attack upon the rate accepted, filed and made effective more than four years earlier by unprotested, final Commission action; and, further, contending that under Section 22 of the Natural Gas Act only a United States District Court had jurisdiction to entertain actions to enforce rights or liabilities created by rates filed with the Commission under that Act. The state trial court denied this motion, and the state supreme court denied a writ of

prohibition holding, first, that the state court had jurisdiction over the controversy; second, that Commission action accepting the Petitioner's filed rate and making it effective was a nullity; and, third, that the purchaser could recover on an unfiled and alleged agreement to refund.

¶ The question presented is:

Where, after tender of a rate for filing under the Natural Gas Act, the Federal Power Commission formally decides to accept, does accept, files, and makes such rate effective, do the courts of the several states thereafter have jurisdiction:

- (a) to entertain and decide a common law action which collaterally attacks the Commission decision;
- (b) to declare the Commission decision making such filed rate effective, to be a nullity; and
- (c) to substitute a different price for the filed rate and to enforce an unfiled agreement which changes, retroactively, the filed rate made effective by the Commission decision.

STATUTES INVOLVED

The provisions of the federal statute involved are Sections 4, 5, 16, 19, and 22 of the Natural Gas Act, 52 Stat. 822, 823, 830, 831, and 833 (1938), 15 U.S.C. 717c, 717d, 717e, 717f, and 717g (Appendix F, pp. 45a-55a). Sections 154.92 through 154.94 of the Federal Power Commission's Regulations under the Natural Gas Act (18 C.F.R. 154.92-154.94), are also involved, having the force and effect of statutes (Appendix G, pp. 56a-59a).

STATEMENT

This case involves two propositions being asserted in a large number of actions now pending in various state and federal courts — first, that rates filed, accepted, and made effective under the Natural Gas Act may be rendered void by subsequent judicial decisions in independent proceedings solely involving the validity of state pricing orders, and, second, that recoveries for differences between these effective, filed rates and various unfilled “contract prices” may be had by bringing suits upon unfilled contracts.

The filed rates in question were accepted and made effective by unprotested and now final Federal Power Commission (Commission) action in late 1954 and early 1955. The state order in question, issued in 1953, was declared invalid in 1958 by this Court, *Cities Service Gas Co. v. State Corporation Commission of Kansas, et al.*, 355 U.S. 391 (1958). The issues now in the courts thus revolve around the interrelation, if any, of these events occurring over a period of some five years.

As a result of the decision of this Court in *Phillips Petroleum Co. v. State of Wisconsin, et al.*, 347 U.S. 672 (1954), the Commission, on July 16, 1954, issued its Order No. 174 requiring producers, including Petitioner, to file with the Commission their rates as in effect on June 7, 1954, together with copies of all contracts, supplements, etc., affecting such rates.¹

¹ Order No. 174, subsequently replaced by Order No. 174-A, promulgated Sections of the Commission's Regulations under the Natural Gas Act now appearing in 18 C.F.R. 154.91 *et seq.* (See Appendix G, pp. 56a-59a for pertinent sections.) For brevity, these sections will be referred to as Order No. 174-A.

Pursuant to such order, Petitioner, on November 16, 1954, tendered to the Commission for filing the rate of 11¢ per Mcf at 14.65 p.s.i.a. as the rate in effect on June 7, 1954; and in connection therewith filed copies of invoice covering gas sold to Cities Service Gas Company (Cities) on June 7, 1954, at a price of 11¢, copies of the original contract, and copies of the order of the Kansas Corporation Commission prescribing a minimum price of 11¢ per Mcf (hereinafter referred to as the Kansas order) (R. 1). On November 16, 1954, Cities was notified by Petitioner of the contents of the rate filing which Petitioner was tendering. Subsequently, there being no protest or other objection by Cities to this 11¢ filing, the Commission, on January 26, 1955, duly convened and voted to accept, and thus make effective as the filed rate under the Natural Gas Act, the 11¢ rate so tendered. (Pertinent portions of the Commission's minutes are set forth in Appendix H, pp. 61a-64a). By letter order dated March 2, 1955, the Commission notified Petitioner of this action (Appendix I, pp. 70a-75a).

Cities paid Petitioner the 11¢ per Mcf rate for gas delivered from January 1, 1954, through June 30, 1957, and at a higher filed rate from July 1, 1957, through November 22, 1957.³ However, upon invalidation of

² On February 1, 1957, the name of Petitioner was changed from Stanolind Oil and Gas Company to Pan American Petroleum Corporation.

³ Petitioner's Answer (R. 24) also shows that for the period after July 1, 1957, Petitioner defended upon the basis of a filed rate of 11.0715¢ per Mcf at 14.65. For purposes of brevity in this petition, detailed facts as to that rate are omitted. It should be noted, however, that on July 1, 1957, Petitioner tendered to the Commis-

the Kansas 11c order by this Court on January 20, 1958, Cities brought the action above referred to against Petitioner, based upon allegations that on January 21, 1954, Cities advised Petitioner by letter that it would pay the price of 11c per Mcf, but was doing so involuntarily and under compulsion, and that should the Kansas order be held to be invalid it would expect to be refunded the amounts it had paid in excess of amounts which would have accrued under the original contracts. Cities also alleged that the provisions of this letter were referred to on all of the checks by which Cities paid Petitioner, which checks were accepted and cashed by Petitioner.

On the basis of these allegations, Cities sought recovery in the state court on the theory that the January 21, 1954, letter, the reference thereto on the checks, and the acceptance of the checks constituted a contract to make refund. Other common law bases for recovery were set forth in the petition, but the contract theory was accepted by the Supreme Court of Delaware and it is unnecessary to set forth here the other theories. Petitioner denied the legal existence of such a refund contract. However, for purposes of this petition, we assume, as did the court below, that such a refund contract existed.

Petitioner showed that the January 21, 1954, letter was not filed with the Commission and was not a part

sion a notice of change of the filed rate from 11c to 11.0715c per Mcf. By formal Commission action, this rate was accepted, filed, and made effective as of July 1, 1957. As is true with respect to the filing in 1954 and Commission action thereon, in this instance Cities had notice of the tender, but did not protest, challenge, or otherwise object to the change of rate nor did it seek rehearing upon and judicial review of Commission action making that rate effective.

of Petitioner's rate filing. Petitioner showed the provisions of the Natural Gas Act requiring the filing of rates of natural gas companies; the implementation of that statute by Commission Order No. 174-A; Petitioner's compliance with that order by filing the requisite documents; and the acceptance of the 11c rate by the Commission. Petitioner further showed that Cities, although notified of the filing at the time of its tender, had raised no objection before the Commission to the filing of the 11c rate as the rate in effect on June 7, 1954, as required by Order No. 174-A, and took no exception to the acceptance of that rate by the Commission as the filed rate of Petitioner, and that Cities did not apply for rehearing upon or petition for review of the Commission action.

Petitioner moved for summary judgment. Petitioner asserted that Cities was precluded from maintaining any action on the purported agreement to refund, not on file with the Commission, as the rights of the parties were fixed by the Natural Gas Act; that the only legal rate was that filed with and accepted by the Commission pursuant to its regulations as such matters are within the exclusive primary jurisdiction of the Commission; that, except for review proceedings under Section 19 of the Act, the courts of the several states and of the United States are bound by the Commission's action making Petitioner's rates effective; and that the only basis for recovery by Cities would have to be for charges paid in excess of the filed rate and the adjudication of such matters is within the exclusive jurisdiction of the United States District Courts under Section 22 of the Act.

Subsequently, in consolidated companion cases to the action against Petitioner, the Superior Court overruled a similar motion, and at this juncture Petitioner, together with the defendants in the consolidated cases, proceeded in the Supreme Court of Delaware with a petition for a writ of prohibition, seeking to prohibit the Superior Court from proceeding further with these actions. Cities, plaintiff in the cases below, intervened as a respondent.

The Supreme Court of Delaware, consistent with Petitioner's contentions, first concluded that:

"The Natural Gas Act requires natural gas companies to file rate schedules with the FPC, under such regulations as the Commission may prescribe." (Appendix B, p. 18a)

* * * * *

"Defendants duly filed the application and documents required. These documents included copies of the contracts with Cities, copies of the Kansas Price Order, and statements showing that the price to Cities on June 7, 1954, was 11c per M.c.f. at the specified pressure.

"As these documents were filed, the Commission duly convened and voted to accept them for filing." (Appendix B, p. 19a)

Nevertheless, the court went on to hold that a state court has jurisdiction to declare a part of a filed rate schedule to be a nullity, to determine that the legal rate is different from the rate that the Commission has accepted and filed by a final order, and to render

¹ These consolidated cases were: *Cities Service Gas Co. v. Columbian Fuel Corp.*, Civil Action Nos. 670 and 708, 1958, and *Cities Service Gas Co. v. The Texas Co.*, Civil Action No. 671, 1958.

judgment based upon an alleged contract, not on file with the Commission as a part of a rate schedule.

In so doing, the court noted the trial court's difficulty with the impact of the Natural Gas Act:

"The trial court held that the actions were suits founded on the contracts to refund excessive payments, and not on the Natural Gas Act. Agreeing with the defendants that the only legal rate is the filed rate, it held that the contract action could be maintained if it is not inconsistent with federal law or regulation. It further held that as a matter of law the only lawful filed rate is the contract rate . . ." (Appendix B, p. 21a)

On this point, the court's construction of the Act and of the legal significance of Commission action was:

"If under the Natural Gas Act a gas producer and a distributor may agree to fix the rate, and from time to time change it, absent any proceeding before the Commission to regulate the rate, why may they not agree that the rate to be paid shall be the contract rate if the rate imposed by a State Commission shall be held invalid? This, in effect was what the parties here agreed upon.

"If so, it seems to us that the claims here are not founded upon any liability created by the Natural Gas Act, but upon a private contract deriving its force from state law." (Appendix B, pp. 24a-25a)

The existence of the earlier determination by the Commission as to acceptance and filing of Petitioner's rate was recognized:

"Defendants say that in any event Cities is attempting to attack collaterally the 'filed rate'.

and that, whether right or wrong, the rate accepted for filing by the Commission, including the Kansas order, is the effective filed rate, and Cities is bound by it until it succeeds in having the Commission change it." (Appendix B, p. 29a)

But, the court declared the Commission's still outstanding decision accepting and filing that rate to be a nullity:

"The difficulty with this argument is, once again, that the federal courts have authoritatively held that the Kansas price-fixing order was void *ab initio* because the Natural Gas Act had pre-empted the field. Being void the unilateral filing of the order as part of the rate schedules was a nullity." (Appendix B, p. 29a)

Having thus decided the "filed rate" had no significance, the court stated the question:

"... The substantial question which emerges, in one form or another, is whether the state courts have jurisdiction to entertain the suits on the refund contracts." (Appendix B, p. 30a)

And, thereupon, it made its ultimate conclusion that "such jurisdiction" exists in the state courts, and denied the petition for writ of prohibition.

On March 17, 1960, the Supreme Court of Delaware, in considering a motion for a stay of the court's judgment, stated that: "All the members of the Court are of opinion that the application for a stay should be granted, for the reasons that the case seems to us to be an appropriate one for the granting of the writ [of certiorari] . . ." (Appendix C, p. 33a) Stay of the court's judgment, pending action in this Court upon a petition for writ of certiorari, was accordingly entered on March 18, 1960.

REASONS FOR GRANTING THE WRIT

Contrary to this Court's holding in *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246 (1951), the court below has held that there can be a legal rate different from that on file with the Commission. The impact of the holding below is obvious: no interested person can look to Commission action to determine what is the effective rate that legally may be charged and received.

Filed rates under the Act fall generally into three categories—(1) rates tendered under Section 4 which are formally accepted and made effective by Commission action without condition or suspension (which is the case here); (2) rates suspended under Section 4(e) and which are thereafter permitted to become effective upon a showing of "reasonableness"; and (3) rates determined not to be unreasonable after hearing under Section 5. Rates in the first category—those filed and made effective without condition or suspension—today form the legal rates for thousands of sales by producers to pipeline companies, and by pipeline companies to distributors. These rates are effective by Commission action, and, like other rates, remain the only legal, effective rate until changed by Commission orders, after investigation under Section 5, or after tender of a new rate by a filing company under Section 4.

The adverse effect of the decision below upon the accomplishment of the primary objectives of the Act is exemplified by the following statement of the Solicitor General:

Petition for Writ of Certiorari, *F. P. C. v. Shell Oil Co.*, No. 170, October Term, 1959, writ granted October 12, 1959.

"The question is not only important generally in the field of administrative law but is of particular importance to the administration of the Natural Gas Act. Over 10,000 basic contracts of independent producers have already been filed with the Commission as rate schedules, and each of them potentially presents questions of contract interpretation to be resolved by the Commission—e.g., to determine whether a purported initial rate or change of rates should be accepted for filing."

The rate filing provisions of the Act were intended to secure to the gas consuming public and natural gas companies the benefits arising from definite knowledge of the exact rate which a regulated company has the right to collect and the consumer is obligated to pay. That objective can be accomplished only if the Commission determines, at the time rate filings are tendered, whether such filings should be accepted or rejected; and, if accepted, *exactly what rate is being accepted as the filed rate.*

Unless the Commission makes such determinations it cannot exercise its duties under Sections 4 and 5 of the Act. For example, if the Commission did not know what is the effective rate, it could not decide whether to suspend an increase in that rate by exercising its powers under Section 4(e), since it would not know the amount of increase above the then effective rate. Similarly, the Commission could not determine whether to inaugurate an investigation of "reasonableness" of a filed rate under Section 5(a), unless it knew the exact amount of the effective rate in question.

These Commission functions under Sections 4 and 5 are the "heart of the regulatory scheme" of the Act.

Their accomplishment would be thwarted if state courts are permitted in collateral proceedings to set aside unreviewed and, therefore, final determinations of the Commission of the exact amount of the rate it is in each instance accepting for filing.

1. The State Court Has Decided a Federal Question of Substance Not Heretofore Determined by this Court.

Reduced to its bare bones, the core of this case may be stated as follows: Petitioner tendered a certain rate (11c), higher than the contract price (8.4c), for filing with the Commission. The 11c rate, without objection, was duly accepted for filing and filed by the Commission. No appeal was taken from the Commission order. Despite these facts, the purchaser alleged that by an unfiled contract, the parties agreed that should the Kansas 11c order be held invalid then the original 8.4c contract price should be the controlling price, and refund should be made accordingly. Purchaser filed suit in the state court to recover on the unfiled contract.

Assuming the existence of such a contract, as did the court below, we come then to a question of obvious importance to the orderly administration of the Act: Do the courts of the several states have jurisdiction to enforce ancillary unfiled contracts to vary retroactively rates filed with and accepted by the Commission? The court below has held that they do have.

The Supreme Court of Delaware in its decision states:

"We are not cited to any decision of the Supreme Court of the United States authoritatively settling the question before us."

This Court has recognized in its rules that this is one of the substantial grounds for granting review of a state court decision.

We will subsequently point out that the decision of the Supreme Court of Delaware is probably not in accord with applicable decisions of this Court. It is sufficient here to note that the Delaware Court was of the opinion that it was dealing with a question not previously decided by this Court. The opinion shows further that the court recognized it was construing federal statutes, regulations of a federal commission, and federal decisions. The opinion states:

"It is certainly true that the adjudication of these claims does entail an examination of the provisions of the Natural Gas Act, the regulations of the Commission, and the applicable federal decisions."

The court's ultimate conclusion that the actions arise under private contracts and not under federal statutes is simply the result of construing the federal statutes as permitting an unfilled private contract to take precedence over the rates filed with and accepted by the Commission.

It is this very question which it is here sought to review. With the scores of cases pending in state and federal courts to be determined by the answer to such question,⁶ it is apparent that unless this Court is to give an authoritative decision construing this federal statute, there will be a wide conflict of decision and a resulting lack of uniformity in its administration. The

⁶ Some of the cases of which this Petitioner has knowledge are set forth in Appendix J, pp. 83a-85a. It is understood that literally hundreds of cases are yet to be filed.

laws of the United States will not be applied with uniformity.

2. The Decision of the State Court is Probably Not in Accord With Applicable Decisions of this Court.

Although this particular statute has not been construed by this Court in a case involving identical facts, statutes so similar in form and intent have been the subject of decisions of this Court on facts so closely related to the facts here as to make it seem probable that the decision of the Delaware Court is not in accord therewith.

In *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246 (1951), this Court construed rate filing statutes administered by the Commission regulatory of the rates of power companies. Cf. Sections 205 and 206 of the Federal Power Act, 49 Stat. 851 and 852, 16 U.S.C. 824d and 824e. The provisions of the statute there involved are identical to the provisions of the Natural Gas Act with which we here deal. Both require that all rates be filed with the Commission subject to rules and regulations to be prescribed by that Commission. The *Montana-Dakota* case deals with the proposition that under these statutes the only rate which may legally be paid or received is the rate that has been filed with and accepted by the Commission. *It is authority for the rule that a court is powerless to alter in any manner a rate that has been filed and accepted by the Commission.* This is true regardless of the fact that the rate might be unlawful for any of various reasons. Under the doctrine of the *Montana-Dakota* case, lawful or not, such a rate is the only legal rate.

In *Montana-Dakota*, this Court found that the United States District Court below had erroneously entertained a claim that a document that had been duly accepted by the Commission as a part of a rate schedule was void and should not be considered to be an operative part of the rate schedule, and that the rate prescribed by the rate schedule as it had been duly accepted by the Commission should be changed to some other rate. This Court held that the District Court could not make such determination or entertain a claim which required it to make such a determination. This Court stated (p. 251):

" . . . It can claim no rate as a legal right that is other than the filed rate, whether fixed or merely accepted by the Commission, *and not even a court can authorize commerce in the commodity on other terms.*" (Emphasis supplied.)

Mr. Justice Frankfurter, joined by Mr. Justice Black, Mr. Justice Reed and Mr. Justice Douglas, though dissenting from the majority opinion, nevertheless agreed with the majority on the proposition that once a rate was filed and accepted it became the only legal rate and could not be collaterally challenged. They stated (p. 256): "Unless they are challenged, either by an interested party or on the Commission's initiative, the filed rates become the legal rates."

The decisions of this Court are numerous holding that a rate filed with the Interstate Commerce Commission is the only legal rate and cannot be collaterally attacked. Outstanding among these cases is the historic opinion written by Mr. Justice White in *Texas & Pacific Railway Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907). The considerations referred to

by Mr. Justice White in that decision as compelling a construction of the statutes which denied jurisdiction of a court in an action collaterally attacking a rate filed with the Interstate Commerce Commission, are equally persuasive here. The lack of uniformity which inevitably will result from exercise of such jurisdiction will defeat the public benefits sought to be accomplished by the Natural Gas Act.

The Courts of Appeals have consistently held that even though the documents comprising a rate schedule provide for automatic changes in rate, the rate accepted and filed by the Federal Power Commission may not be changed except upon further order of the Commission. Cf. *Mississippi Power & Light Co. v. Memphis Natural Gas Co.*, 162 F. 2d 388 (5th Cir. 1947), cert. den. 332 U.S. 770; *Cities Service Gas Producing Co. v. F.P.C.*, 233 F. 2d 726 (10th Cir. 1956), cert. den. 352 U.S. 911; *Signal Oil & Gas Co. v. F.P.C.*, 238 F. 2d 771 (3rd Cir. 1956), cert. den. 353 U.S. 923; *Bel Oil Corp. v. F.P.C.*, 255 F. 2d 548 (5th Cir. 1958), cert. den. 358 U.S. 804; *Continental Oil Co. v. F.P.C.*, 236 F. 2d 839 (5th Cir. 1956), cert. den. 352 U.S. 966; *Episcopal Theological Seminary of the Southwest, et al. v. F.P.C.*, 269 F. 2d 228 (D.C. Cir. 1959), cert. den. 361 U.S. 895.

Contrary to the above decisions, the court below assumed and held that a private agreement which was never filed as a part of a rate schedule nevertheless could form the basis for automatically and retroactively changing the filed rate to a lower rate never tendered to the Commission. Stated differently, under the above decisions, a rate may not change upward without Commission order and, by the same token it should logically follow that such a rate may

not change downward without Commission action. Under the Delaware decision, effective rates under the Act are subject not only to subsequent orders of the Commission, but also to orders of the courts of the several states in collateral proceedings.

If the trial court in Delaware may entertain a collateral attack upon the rate duly filed and accepted pursuant to the lawful rules and regulations of the Commission, and may declare such rate void, so may every other court of general jurisdiction in the fifty states. An authoritative determination on this question of construction of important provisions of the Natural Gas Act is sorely needed.

3. The Court Below Misinterprets United Gas Pipe Line Co. v. Mobile Gas Service Corp., 350 U.S. 332 (1956). The court below apparently concluded that despite the *Montana-Dakota* rule, this Court's opinion in *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956), opened the door for collateral attacks upon Commission actions. It held that the filing of the Kansas 11¢ order as a part of a rate schedule constituted a unilateral filing within the meaning of *Mobile*. Based upon this reading of *Mobile*, the court held that the Commission's acceptance thereof was a nullity even though Cities did not seek a rehearing of the Commission's action or seek judicial review thereof as prescribed by Section 19 of the Act. The court below reached its decision by determining that under *Mobile* this Court's decision in *Cities Service Gas Co. v. State Corporation Commission of Kansas, et al.*, 355 U.S. 391 (1958), automatically made the Commission's action an absolute nullity. Under this reading of *Mobile*, any

person who questions the validity of a duly accepted rate schedule may simply ignore the provisions of Section 19 of the Act and by obtaining a judgment in a collateral proceeding automatically invalidate the Commission's action. This is inconsistent with this Court's decisions in *F.P.C. v. Colorado Interstate Gas Co.*, 348 U.S. 492 (1955); *F.P.C. v. Hope Natural Gas Co.*, 320 U.S. 591 (1944); and *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320 (1958), and with over 75 years of administrative law.⁷

⁷ The court below apparently read this Court's opinion in *Mobile* as holding that unless a filed rate had been determined to be "reasonable" after formal hearing on that issue, such a filed rate was not a "legal rate" under the *Montana-Dakota* rule, and thus remained subject to review and revision by a state court in an action upon a contract. The federal Courts of Appeals have not construed *Mobile* so broadly. Following the *Montana-Dakota* rule and this Court's holdings on the finality of unassailed, although possibly once voidable, administrative actions, the Courts of Appeals have reason, 1, after this Court's holding in *Mobile*, that where there is the tender of a unilateral rate, subject to protest and rejection under *Mobile* because the rate so tendered is contrary to a pre-existent contract, the Commission's action accepting and making effective that rate may nevertheless become final and immune from collateral attack if its action is not protested and set aside in timely fashion under the exclusive review procedures of Section 19 of the Natural Gas Act. See discussion of *Mobile* in *Tater Gas Service Co. v. FPC*, 247 F. 2d 590, 593 (D.C. Cir. 1957); cert. denied, 355 U.S. 895; reasoning in *Portsmouth Gas Co. v. FPC*, 247 F. 2d 90 (D.C. Cir. 1957) wherein the Court of Appeals recognized the controlling importance of a timely challenge of Commission action by remanding the case for a determination of whether, as a matter of fact, the purchaser had failed to protest and thus had acquiesced in a unilateral change of an earlier contract price; the holding in *Cities Service Gas Co. v. FPC*, 255 F. 2d 860 (10th Cir. 1958), cert. denied, 358 U.S. 837, that Commission action accepting a tendered filing was immediately reviewable, since a person challenging validity of that Commission action would be bound by that action, in the absence of judicial review; and the reasoning to the same effect in discussion of reviewability of Com-

Petitioner submits that, contrary to the decision below, this Court did not in the *Mobile* case erase all of its prior decisions on exhaustion of administrative remedies and on exclusive primary administrative jurisdiction. In the interest of preserving the integrity of Commission action and of administrative determinations generally, the decision below should be reviewed.

4. For any Court to have Jurisdiction it would have been Necessary for the Plaintiff to have Exhausted its Administrative Remedies before the Federal Power Commission. The filing by Petitioner of the 11¢ rate was not protested by Cities, nor by anyone else. No statutory review proceeding was instituted to set aside the order of the Commission accepting the rate.* If a state court is permitted to exercise jurisdiction

mission letter orders of February 1956 in *Natural Gas Pipeline Co. of America v. FPC*, 253 F. 2d 3 (3d Cir. 1958), cert. denied, 357 U.S. 927. Thus read, the holding in *Mobile* is compatible with the *Montana-Dakota* rule: A unilateral rate filing may be subject to protest and rejection, but once accepted and made effective without protest or timely judicial review, that filed rate, like any other, may not be attacked in collateral proceedings. The reasoning of the court below, thus, is in conflict with the reading of *Mobile* in the federal Courts of Appeals.

* The Delaware Courts apparently misunderstood the technical language used by the Commission in its letter orders. In accordance with practice followed in regulatory law, the Commission thereby notifies a filing company that its tendered rate has been accepted and is effective, *i.e.*, is now the legal, filed rate. At the same time, the Commission includes sentences advising that this acceptance is not to be construed as "approval," *i.e.*, a statutory finding that the tendered and filed rate is "reasonable." Under the statute, such "approval" of a filed rate as "reasonable" is deferred until after investigation under Section 4 or 5, and until such time as the filed rate is thus "approved" or "disapproved" by further order of the Commission, the "accepted," filed rate remains the only legal rate. The letter order serves as notice that

of the action against Petitioner in this case, it has a jurisdiction federal courts do not have.

This Court has held many times that where a statute provides for an administrative procedure, such procedure and the remedies thereby provided must be exhausted before a court may have jurisdiction to consider the subject.⁹ The statute specifically provides for review of orders by the United States Court of Appeals, and for the filing of an application to the Commission for rehearing as a mandatory prerequisite to such review.¹⁰ (15 U.S.C. 717r) In exact circumstances, this procedure was followed and the actions of the Commission in accepting or rejecting the tendered rate filings ultimately were reviewed under this review procedure.¹¹ What Cities in the

a rate, by Commission action, is such an accepted, filed rate, and thus the only rate that may be legally charged. Contrary to these familiar principles, the Delaware Courts seem to have assumed that Commission language reserving totally distinct action of "approval," means that its action accepting and filing a rate has no legal significance, and that only an "approved" rate can be considered a legal, filed rate under the Act.

⁹ See for example: *Prentiss et al. v. Atlantic Coast Line Co.*, 211 U.S. 210 (1908); *Yakus v. United States*, 321 U.S. 414 (1944); *Myers et al. v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938).

¹⁰ As this Court noted in *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 336 (1958), where Congress prescribes an exclusive procedure for questioning validity of determinations of a regulatory agency, such questioning must be done in the manner prescribed by statute or not at all. This Court concluded that, "Such statutory finality need not be labeled *res judicata*, estoppel, collateral estoppel, waiver or the like either by Congress or the courts."

¹¹ *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956), where the order of the Commission accepting the rate filing was set aside; *United Gas Pipe Line Co. v. Memphis L. G. & W. Division*, 358 U.S. 103 (1958), where the order accepting the rate filing was sustained.

present action undertakes to do is to have a state court determine the validity of the rate that was filed with and accepted by the Commission without following the statutory procedure required by the Act.

If a state court in Delaware may now exercise jurisdiction in a collateral proceeding to declare void a rate filing accepted by the Commission, there will exist two methods of testing the validity of orders of the Commission—one, the method provided in the Natural Gas Act and the other by collateral attack in the various trial courts of the land. The jurisdiction of the United States Courts of Appeals may thus be defeated.

5. This Action is One Brought to Enforce a Right Created by the Natural Gas Act and Hence, Jurisdiction of the State Court is Excluded by Section 22 of the Act. Section 22 of the Act provides that the United States District Courts have exclusive jurisdiction to entertain actions brought to enforce any liability or duty created by the Natural Gas Act.

While the Supreme Court of Delaware appears to hold that the action is not based upon the Natural Gas Act but is based upon the alleged refund agreement, the effect of its ruling is to declare the filed rate void and to substitute therefor the price resulting from the unfilled refund letter. The Supreme Court of Delaware finds that the Natural Gas Act requires the filing of these rate schedules; it finds that Petitioner duly filed the documents required by the statute and the regulations of the Commission; it finds that the statements filed showed the price to Cities on June 7, 1954, was 11c per Mcf and then finds that the Commission

accepted for filing and made effective 11c per Mcf as Petitioner's filed rate.

The Supreme Court of Delaware notes with approval the finding of the trial court that the only legal rate is the filed rate and that the contract action could be maintained only if not inconsistent with federal law or regulations. That court undertakes to avoid the loss of jurisdiction which would essentially seem to follow these conclusions, by finding that upon invalidation of the Kansas order, the alleged unfiled agreement then had the effect of voiding the rate originally filed and made effective by formal Commission action and substituting therefor the original contract price as the filed rate. The court then reasoned that this new "filed rate" and the price provided by the unfiled letter agreement being the same, a common law action could be maintained on the unfiled letter agreement.

We submit that all the court has done is to substitute a synthetic common law action for what properly should be an action based on the Natural Gas Act. If, as the Delaware Court holds, the price under the original contract somehow became the "filed rate" upon invalidation of the Kansas order, then Cities' action should have been based upon what it claimed to be the filed rate, and the appropriate federal court under Section 22 of the Natural Gas Act, and not a state court, would determine what rate had been accepted and made effective by the Commission.

In final analysis, one of two conditions must exist, and in neither can the state court be said to have jurisdiction. Either the action is to enforce the rate on file with the Commission and exclusive jurisdiction

is in the federal District Courts pursuant to Section 22 of the Act, or the action is an attempt by a state court to exercise jurisdiction over the rates of a natural gas company and such were wholly and completely taken out of the hands of the states by passage of the Natural Gas Act. This Court having twice held that the Natural Gas Act so completely occupied the field of natural gas rate regulation as to exclude state jurisdiction to fix minimum gas rates at the wellhead for conservation purposes (*Natural Gas Pipeline Co. of America v. Panoma Corp., et al.*, 349 U.S. 44 (1955); *Cities Service Gas Co. v. State Corporation Commission of Kansas, et al.*, 355 U.S. 391 (1958)), it can hardly be that state courts yet retain jurisdiction to enforce an alleged unfiled contract which has as its purpose the voiding of a rate filed with and accepted by the Commission and the substitution therefor of another and different rate not considered and accepted by the Commission.

To conclude, if the action is based upon the filed rate, Section 22 of the Act excludes state court jurisdiction; if it is not based on the filed rate, then it is an attempt by a state court to exercise jurisdiction in an area where this Court has said that the Federal Power Commission has exclusive primary jurisdiction.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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